

APPEAL NO. 023061
FILED JANUARY 28, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 1, 2002. Resolving the disputed issues before him, the hearing officer decided that the respondent/cross-appellant (claimant) sustained a compensable repetitive trauma injury, in the form of bilateral carpal tunnel syndrome (CTS), on _____; that she has not had disability resulting from her CTS; that the appellant/cross-respondent (carrier) was not relieved from liability under Section 409.002 or Section 409.004; and, that the carrier waived the right to contest the compensability of the claimant's injury in failing to timely pay or dispute the claim within seven days of receiving written notice of the claim. The carrier challenges all determinations made against it on a sufficiency of the evidence argument, and specifically contends that the seven-day "pay or dispute" waiver does not apply to this case. The claimant filed a cross-appeal challenging the hearing officer's determination of the date of injury and the credibility of one of the carrier's witnesses at the CCH. In addition, the claimant attached documents to her pleading, propounding them as evidence. The claimant did not respond to the carrier's appeal, nor did the carrier respond to the claimant's appeal.

DECISION

Affirmed.

We first address the claimant's additional documents attached to her request for review. In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we generally only consider evidence that was submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with one of the documents that the claimant attached to her request for review, the Texas Workers' Compensation Work Status Report (TWCC-73) and will not consider it on appeal.

We next address the issue of carrier waiver. The carrier essentially asserts that the hearing officer erred, as a matter of law, by applying Section 409.021 and the holding in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), to this proceeding. We note that Downs, which requires adherence to the seven-day "pay or dispute" provisions of Section 409.021, became final on August 30, 2002. Effective September 12, 2002, the Texas Workers' Compensation Commission (Commission)

updated its previous advisories, to require compliance with Downs. Commission Advisory 2002-15, effective September 12, 2002. Here, the carrier argues that because the hearing officer found that the claimant did not timely notify her employer of her injury, per Section 409.001 and did not timely file an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) within one year of her date of injury, as required by Section 409.003, and did not have good cause for her failure to do so, the carrier was not required to "pay or dispute" within seven days of its first written notice of the claimant's claim. As noted above, the carrier did not comply with the requirements of Section 409.021(a) by either agreeing to initiate benefits or filing a notice of refusal within seven days. Thus, it has lost its right to contest compensability, which includes its right to assert defenses under Sections 409.002 and 409.004 based upon the claimant's failure to give timely notice of injury to her employer and to timely file a claim for compensation. Downs, *supra*; see also Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002; Texas Workers' Compensation Commission Appeal No. 022113, decided October 3, 2002; and Texas Workers' Compensation Commission Appeal No. 022091-s, decided October 7, 2002. The carrier also contends that the retroactive application of Downs is error. This argument is insupportable. Commission advisory 2002-15 provided, "All **previous Advisories** issued by the Commission regarding this issue are **superseded** by this Advisory and the Supreme Court decision." (Emphasis added). The Appeals Panel has since applied Downs when the issue of carrier waiver is raised on appeal. See, e.g., Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002 (rejecting the carrier's argument that Downs should not be applied retroactively); Texas Workers' Compensation Commission Appeal No. 022230, decided October 21, 2002; Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002. In view of our prior decisions and the findings by the hearing officer that the carrier neither initiated the payment of benefits nor denied the claim within seven days after receiving written notice of the claimant's injury, we cannot conclude that the hearing officer erred in determining that the carrier waived its right to contest compensability of the claimant's injury.

The parties presented conflicting evidence on the remaining issues. These issues presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer was persuaded that the claimant sustained her burden of proving that she sustained a compensable repetitive trauma injury. The hearing officer's determinations regarding the date of injury, the claimant's untimely reporting the injury to her employer, and the claimant's untimely filing a TWCC-41 are likewise supported by the evidence. As discussed above, the carrier waived the defenses to be made under Sections 409.002 and 409.004. The factors emphasized by the carrier and the claimant in challenging the hearing officer's determinations on appeal are the same factors they emphasized at the hearing. The significance, if any, of those factors was a matter for the hearing officer in making his credibility determinations. Nothing in our

review of the record reveals that the challenged determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse these determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In addition, the hearing officer did not err in finding that the claimant was unable to obtain or retain employment for reasons other than her compensable CTS, and thus did not have disability. See Section 401.011(16).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ATLANTIC MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**NICHOLAS PETERS
12801 NORTH CENTRAL EXPRESSWAY, SUITE 100
DALLAS, TEXAS 75243.**

Terri Kay Oliver
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge